Chapter VII

Conclusion

For a study of Hindu law, a study of its legal history is absolutely essential. The roots of the present lie in the past, buried deeply in the historical remnants. The historical method has come as the appropriate method of studying the human institutions for that alone coupled with other axes like caste, class, race or gender helps in giving a true perspective to the whole study. Legal history is not merely a study of theoretical or idealistic aspects but by incorporating the elements of legal practice, it comes of as a study of great practical value, too. In India, the study of law becomes even more interesting for here, law was neither the plain command of the sovereign nor a catalogue of rules. Law, more so Hindu Law in India was an organic phenomenon, a vibrant social process and a dynamic concept. It is surprising to note that law in India was not a mechanical application of rules but a process filtered by creativity and deep thinking. It may not have been egalitarian by approach, but it exhibited nearly, all the aspects of law as in civil, criminal and procedural components evolving from rudiments to considerable requirements. It was a legal system where caste and gender were not only all pervasive but almost determined its course of development.

Law has been defined by Kant as "every formula which expresses the necessity of action. However, post-Darwinism, there has been a persistent tendency to reduce legal philosophy to methodological tasks, to see law as it is and not what ought to be and hence, the emphasis on positive laws and pure science of law. This critical approach brought forth what is called analytical jurisprudence.

However, if the positivist approach is rejected and law is not merely studied as a body of rules, doctrines or dogmas, it does not remain a static entity but becomes a living mechanism keeping pace with the social changes. This is legal history and law cannot be understood historical divorced from the history and heritage of a nation.

In early India, that we refer, law was definitely not static. It was evolutionary changing, with the social transformations. It seems to be a continuous process of which, dharma seems to be
the backbone and whose theoretical and practical aspects were supposedly summed up by concepts of acara and vyavahāra.

Law emerged out of the womb of the larger cosmic theory of Dharma. Dharma which was a socio-ethical legal sum total of do’s and don’ts formed the basis of the emergence of law as a definite institution. Law, in the early Indian context itself evolved from the stage of rational law to a science of law, although not altogether divorcing itself from the principles of dharma with which it remained wedded throughout. It is the textual sources in the form of the Dharmasāstras, which provided the basic concept of law and combined with customary law continued to grow.

In the words of early smṛti writers, there seems to be an overlapping of the legal and moral injunctions with the dividing line between them being very thin. It is only in the later smṛti works that law emerged somewhat as a pure science with laws which seem to be part of analytical jurisprudence came forth.

In fact, three stages are discernable in the growth and evolution of early Indian Law. The Vedic and post-Vedic stage talked of law as ‘ṛta’ or the governing principle somewhat similar to Natural law. Principle of truth came to be added to it in the later stage and the Dharmaśastra defined laws pertaining to the social existence. The third stage is represented by the smṛti writers among whom Manu and Yajñavalkya represent the earlier phase while works of Nārada, Bṛhaspati and Kātyāyana emerge as pure legal works. The theory of law which came forth in early India, hence evolved through different stages from ṛta to dharma laws to laws proper.

Further, there are certain interesting features of the Hindu law that emerge from this study. First, it is remarkable that without having a notion of positive law, it not only evolved but attained the status of a science and methodology. Second, the varna, jati and gender prejudices marred the ideas of ‘Equality before law’, ‘Law for all’ or ‘Equality of sexes’. Also, it was a law that accepted and perpetuated the cleavage and hierarchy in the society instead of doing away with them. Third, having emerged out of the larger womb of Dharmaśastra laws, it could never free itself from the influence of Dharma or religion and religious and legal injunctions were more or less overlapping in every realm until the works of Nārada, Bṛhaspati and Kātyāyana came.
Paradoxically however, Hindu law never remained a static institution. Rather, it shared a remarkable adaptability to the changing social milieu (as especially reflected in the interpretation given by later commentators).

From the Dharmaśāstra stage, there is vertical development in the concept of law. The king was seen to assume wider powers and he was deemed as the fountainhead of law and justice. He could not make laws but, he was to uphold and maintain the laws enunciated thereby giving protection to subjects and maintaining the status quo with respect to varnas and asramas. It became one of his primary duties to punish the wrong doer and provide justice. Heavenly rewards were spelled for a righteous king or who protected his subjects justly. He was expected to be a learned in legal matters and was to attend personally to the administration of justice. In doing so, the varna basis was not to be tampered with nor the advise of legal advisors to be ignored. He had a special role, probably in deciding the capital punishment. The advise to king is laid down in Kālidāsa’s play in the term “Yathāprādhadaṇḍa”. He was expected to administer punishments in accordance with the crime.

The role of king is seen in Aśoka’s concern for justice and its administration. That the king had little role in creating fresh norms is visible in that despite Aśoka having professed ahimsa, capital punishment was not done away with in his time. There is even a suggestion to enforce a certain amount of uniformity of procedure and uniformity of decisions on the part of judicial administration.

King was an essential part of the judicial procedure set up. As an apex of law, he was to ensure that law was justly administered. He could initiate certain suits, he had the right to information through separate personages (appointed as Sūcaka or stobhaka as told by Kātyāyana). Viṣṇu’s ena’s charter and the nature of the document suggest that the king was expected to incorporate the elements of prevalent customary laws in practice.

Brāhmaṇas enjoyed a special position with respect to law. As advisors and assistants to king, the Brāhmaṇa’s position remained unequalled. The king was expected to abide by the advice of this court of Brāhmaṇas. However, Brāhmaṇas who dealt with the legal matters were expected to be men well versed
in the science of law and man of character, sweet tempered and not greedy. If such Brāhmaṇas were unavailable, Kṣatrīyas and Vaiśyas (Kātyāyana added, Vaiśya or merchant, too) could take their place, but never a Śūdra. As preceptors of society, the class of Brāhmaṇas imposed its biases on the general fabric of the society. As perpetuators of the caste based hierarchical society, they practiced and enforced these cleavages in the realm of law. Their perception of the patriarchal supremacy and subjugation of the women folk to the men on whom they were dependent determined the levels of gender pervasion in the area of law. Quite naturally, they enjoyed special protection in penal laws. A Brāhmaṇa offender was excluded from the purview of capital or death punishment. Since he was fortified by being born into the higher caste, he was expected to be of the least criminal temperament (by birth and social place). Hence, he could at best be banished or branded but never be hanged for that itself (Brāhmaṇa hatya) was considered to be a grave offence.

Among the other classes, the Kṣatrīyas and Vaiśyas enjoyed the middle position in society as in law. With respect to offence, guilt and punishment, they represented the middle layer. However, it was the śūdra who was as much badly placed in society as in law. For a similar offence, a śūdra was to be awarded death or capital punishment which a Brāhmaṇa was to be banished. Social hierarchy hence created way for legal inequalities with the general position of Varnas remaining same in law as in society.

Early Indian law exhibited certain idealistic concerns as well. Viśṇuśena's charter mentioned that 'puruṣa aprādhe stī na grāhyam'. Now this was a maxim that implied two things – that every individual was accountable for an offence committed by him or her secondly, since women had no independent status with respect to law, she was not to be apprehended for an offence committed by her husband. However, the same is not spelled vice-versa. This could suggest that for a crime committed by her, it was the husband (or the male on whom she was dependent) who could be held responsible. Also, this could suggest that masculine offence was considered more grave and inexcusable. It offers some kind of legal immunity to wives from the ills of the wrong dominated by their husbands.

There is a great deal of stress both in theory and in practice on the conduct of judges. If they performed any extra legal act they were liable to double punishment. Further, they
were not only expected to be just but also prevent the king from being unjust. Asokā's edicts lay great deal of stress on the integrity of judicial officers, too.

The ideal of ‘Yathāprādhaṇḍāṇam’, however, seems to be more an idealistic proportion rather than one that who put in practice. In fact, early India represents a society and law which were far removed from a sense of fairness. Punishments more often than not (until the later law writers) were out of proportion to the offence committed. Retribution rather than reform seemed to be the keynote of penalties. Punishments were harsh, brutal and inhuman for a civilized society. It could have implied greater rusticity with respect to legal thought. The balance between crime and penalty was probably an ideal that was aspired but legal thought was neither able to accommodate nor practice it in the early India that we talk of.

Judicial procedure or Vyavahāra came to be dealt more scientifically by the later smṛti writers like Nārada, Brhaspati and Kātyāyana. Vyavahāra summed up the theoretical and practical aspects of judicial procedure. The chief judge or Prādvivāka conducted the judicial trial under the auspices of the king. Trial began only when the plaintiff and defendant were present. Cases could be civil or criminal, although a clear cut distinction on modern lines is not discernible. But elements like summons, evidence, witnesses, and documents were all there. There are rules negating retrial or punar-nyāya as well. The titles or topics of law were organized into eighteen head.

Civil law encompassing the prosperity law, law of debt inherent, pledges, surety, ownership, deposits, and partnerships, gifts non-payment of wages and boundary disputes have also been dealt with at great length by the smṛti writers. That the patriarch or the head of the family had a complete control over the property is undisputed. She had no power of control over the property while the parents were alive. There seems to be an absence of testamentary power as well. Wife was co-owner of the husband's property except that she had no right to dispose it off on her own. She was entitled to a right of maintenance and control over her stridhana. After the father, the eldest son was supposed to shoulder the responsibility with respect to property and family and others were deemed dependent on him. (Debt was a responsibility of the son, too). In the absence of sons, one
could appoint a daughter and allow her son to inherit all property. There were no clear cut rights for women as wife or daughter or mother. Although it was a sin and offence to cast them off, the wife or daughter or mother had a theoretical say in the property of male dependents and a right to maintenance or dowry or no stridhana.

Criminal laws were based on the notions of good and evil, virtues and vices and rewards and sins. Abuse, assault, theft, betting were considered as major crimes. The prevalence of stringent criminal code suggests that crimes such as these must have prevailed and necessitated such rules. Punishments varied from monetary payment to mutilation to capital punishment for these range of crimes. Theft and burglary were seen as serious offences. With respect to theft, a maxim of Manu holds Brāhmaṇa more responsible than a Śūdra with respect to guilt incurred. (Śūdra’s guilt as eight fold, that of Vaisya as sixteen fold, that of Kṣatriya thirty-two fold, and that of Brāhmaṇa as sixty-four fold – Killing a Brāhmaṇa and killing of women were considered great sin. Adultery was deplored by nearly all the smṛti writers. Likewise, gambling and betting were seen as criminal offences.

Nearly all the smṛti writers exhibit a tough stand with respect to punishments. However, compared to Manu, the later writers are more reasonable with respect to punishments. The single most conspicuous feature of criminal legislation was the immunities enjoyed by the Brāhmaṇa class who were not only treated leniently but excused from death punishment for any serious offence for which the other castes could be hanged. There seems to be a graduated scale of punishment according to the social classes.

The consciousness of gender is even more pervasive than the awareness of class, both however playing a conditioning role in the society. As mentioned in the chapter on gender, it is a fluid concept that is normative and conditions both the individual futures and world view. The awareness as to the masculinity or feminity of oneself heads to particular types of behavior in the same society. This then influences the minds of both who lead and who are led. Gender identities define the respective status of men and women and their relationships in society. In the context of law, gender gets affected as well as affects the tone of law. Ancient India presents a classic example where gender
consciousness exhibited in nearly all socio-legal relationships. Whether we accept the Altekarian paradigm or reject it, gender was a major determinant in the minds of Hindu law writers.

Law in early India accorded an independent, high and privileged status to men and a weaker, subjugated and vulnerable status to women. Equality before law was a far cry from gender viewpoint. Law treated women as weak and one in need of protection. She was deemed dependent on her male relations, hence it was the responsibility of the male relations to take care of her legal status. She was not secure as a legally wedded wife. However, with only a theoretical ownership in husband’s property, she was entitled to no more powers than mere maintenance. Even in this, the legal tie of marriage was stronger for the lower classes. Likewise, women of lower classes were more miserably placed than the higher ones vis-a-vis law. Familial ties, chastity and devotion to husband were extolled as feminine virtues which secured her position in the heaven. Feminine character however, was seen more often than not as despicable and in need to be guarded by men on whom she depended.

For men, the masculinity consciousness demanded that they consider the women dependent on them. To provide protection and maintenance was his supreme obligation. As father, brother, husband and son, he was to take care of his female relations by keeping them under restraint and allowing them only as much as the Brāhmaṇa law writers permitted. One virtue that was emphasized was fidelity towards wife. The punishment for adultery was tough for men (more than women). However, by permitting him to take another wife legally on grounds such as infertility or disease etc. of first wife, it seems men were not bound to carry on the marriage contract. Remarriage was an easier option for men than women, for once he paid the maintenance to the first wife, there was no legal compulsion of divorce before taking another wife.

Women had absolute right as far the strīdhana was concerned. Katyāyana permits her full right to demand her strīdhana and also her share (that of her husband’s on partition).

In the field of civil and criminal laws, women enjoyed the position of protection. Yājñavalkya calls contracts entered by her as invalid. She was not allowed to be a witness except for her
own category. However, strihatya was a heinous crime. In punishments, the treatment of women is more liberal compared to men. Pregnant women, daughters, mother had some special protection.

Hence, in theory as well as practice, law was more favorably placed towards men. Women as such lacked judicial identity of their own. Law considered her vulnerable and therefore in need of protection. Some such protections were there in theory where it was deemed that the person on whom she depended was accountable for her mistakes or fallings. In the inscriptions there are but few such assertions except one that shields her against the crimes committed by her husband.